

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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Marcus Turner,

Plaintiffs,

v.

Harvard MedTech of Nevada, LLC, et.al.,

Defendants.

Case No. 2:22-cv-01264-JCM-BNW

**ORDER**

Before the Court is Defendants' motion to stay discovery. ECF No. 58. Plaintiff responded (ECF No. 62), and Defendant BANA replied (ECF No. 63).

**I. Background**

Defendants move to stay discovery pending the resolution of its Motion to Dismiss by relying on Fed. R. Civ. P. 1 and 26. Defendants argue that the motion is dispositive, that it can be decided without additional discovery, and that it will be granted as Plaintiff has not alleged, as required by NRS 613.010, that he was induced to move to Nevada.

Plaintiff argues the pending Motion to Dismiss simply seeks the dismissal of only one claim and that Defendants have not shown good cause to stay discovery. In addition, Plaintiff argues the pending Motion to Dismiss is barred by Fed.R.Civ.P. 12(g)(2) and, in any event, that he has properly pled the case under NRS 613.010.

Defendants' Reply expands upon its previous arguments.

**II. Legal Standard**

The Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery because a potentially dispositive motion is pending. *Skellerup Indus. Ltd. v. City of L.A.*, 163 F.R.D. 598, 600-601 (C.D. Cal. 1995).

A court may, however, stay discovery under Federal Rule of Civil Procedure 26(c). Fed. R. Civ. P. 26(c)(1); *Clardy v. Gilmore*, 773 F. App'x 958, 959 (9th Cir. 2019) (affirming stay of discovery under Rule 26(c)). The standard for staying discovery under Rule 26(c) is good cause.

1 Fed. R. Civ. P. 26(c)(1) (the court “may, for good cause, issue an order to protect a party or  
2 person from annoyance, embarrassment, oppression, or undue burden or expense,” including  
3 forbidding discovery or specifying when it will occur).

4 The Ninth Circuit has not provided a rule or test that district courts must apply to determine if  
5 good cause exists to stay discovery. *Salazar v. Honest Tea, Inc.*, No. 2:13-CV-02318-KJM-EFB,  
6 2015 WL 6537813, at \*1 (E.D. Cal. Oct. 28, 2015) (“The Ninth Circuit has not provided guidance  
7 on evaluating a motion to stay discovery pending resolution of a potentially dispositive motion,  
8 other than affirming that district courts may grant such a motion for good cause.”); *Mlejnecky v.*  
9 *Olympus Imaging Am., Inc.*, No. 2:10-CV-02630, 2011 WL 489743, at \*6 (E.D. Cal. Feb. 7,  
10 2011) (“The Ninth Circuit Court of Appeals has not announced a clear standard against which to  
11 evaluate a request or motion to stay discovery in the face of a pending, potentially dispositive  
12 motion.”).

13 The Ninth Circuit has, however, identified one scenario in which a district court may stay  
14 discovery and one scenario in which a district court may *not* stay discovery. The Ninth Circuit has  
15 held that a district court *may* stay discovery when it is convinced that the plaintiff will be unable  
16 to state a claim upon which relief can be granted. *See Wood v. McEwen*, 644 F.2d 797, 801 (9th  
17 Cir. 1981) (“A district court may limit discovery ‘for good cause’, Rule 26(c)(4), Federal Rules of  
18 Civil Procedure, and may continue to stay discovery when it is convinced that the plaintiff will be  
19 unable to state a claim for relief.”); *B.R.S. Land Invs. v. United States*, 596 F.2d 353, 356 (9th Cir.  
20 1979) (“A district court may properly exercise its discretion to deny discovery where, as here, it is  
21 convinced that the plaintiff will be unable to state a claim upon which relief can be granted.”).<sup>1</sup>

22 The Ninth Circuit has also held that a district court may *not* stay discovery when discovery is  
23 needed to litigate the dispositive motion. *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d  
24 378, 383 (9th Cir. 1993) (district court would have abused its discretion in staying discovery if  
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26 <sup>1</sup> The Court interprets both these Ninth Circuit cases as providing one scenario in which it is appropriate to  
27 stay discovery but not the only scenario. *See also Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987)  
28 (affirming stay of discovery without discussing whether court was convinced plaintiff could not state a  
claim before entering stay); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (same); *Clardy v.*  
*Gilmore*, 773 F. App’x 958, 959 (9th Cir. 2019) (same).

1 the discovery was necessary to decide the dispositive motion); *Kamm v. Cal. City Dev. Co.*, 509  
2 F.2d 205, 210 (9th Cir. 1975) (same).

3 Based on this Ninth Circuit law, district courts in the District of Nevada typically apply a  
4 three-part test to determine when discovery may be stayed.<sup>2</sup> *See, e.g., Kor Media Group, LLC v.*  
5 *Green*, 294 F.R.D. 579 (D. Nev. 2013). This Court will refer to this test as the “preliminary peek  
6 test.” The preliminary peek test asks whether (1) the pending motion is potentially dispositive, (2)  
7 the potentially dispositive motion can be decided without additional discovery, and (3) after the  
8 court takes a “preliminary peek” at the merits of the potentially dispositive motion, it is  
9 “convinced” that the plaintiff cannot state a claim for relief. *Id.* at 581. If all three questions are  
10 answered affirmatively, the Court may stay discovery. *Id.* The point of the preliminary peek test  
11 is to “evaluate the propriety of an order staying or limiting discovery with the goal of  
12 accomplishing the objectives of Rule 1.” *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D.  
13 Nev. 2011). Rule 1 provides that the Federal Rules of Civil Procedure should be construed “to  
14 secure the just, speedy, and inexpensive determination of every” case. Fed. R. Civ. P. 1.

15 This Court, however, has found the preliminary peek test to be problematic because it is often  
16 inaccurate and inefficient.

17 First, applying the preliminary peek test does not always lead to “accurate results” in which  
18 the cases that will ultimately be dismissed are stayed and vice versa. This is so for two primary  
19 reasons. In the District of Nevada, a magistrate judge applies the preliminary peek test and  
20 decides whether discovery should be stayed; however, a district judge decides the dispositive  
21 motion. These judges sometimes have different views on the merits of the dispositive motion,  
22 leading to discovery being stayed in some cases it should not have been stayed in and vice versa.  
23 *See also* Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay*  
24 *Discovery When A Motion to Dismiss Is Pending*, 47 Wake Forest L. Rev. 71, 97 (2012)  
25 (identifying same issue). Additionally, the test requires the magistrate judge to take a  
26 “preliminary peek” (i.e., a superficial look) at the dispositive motion and be *convinced* that the

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28 <sup>2</sup> The Court notes that these District of Nevada cases are persuasive authority, and the Court is not bound by them.

1 plaintiff cannot state a claim for relief before staying discovery. *Kor Media*, 294 F.R.D. at 583-84  
2 (discovery stay inappropriate when there is only “a possibility” defendant will succeed on its  
3 dispositive motion; “[g]enerally, there must be *no question* in the court’s mind that the dispositive  
4 motion will prevail[.]”). When the preliminary peek test is applied as written, it leads to discovery  
5 being stayed in only the simplest, legally baseless cases. For most cases, and certainly complex  
6 cases, it is impossible for the Court to do a “preliminary peek” and be *convinced* that the plaintiff  
7 cannot state a claim. This is problematic because complex cases, in which discovery will be  
8 extremely costly, are the types of cases where discovery stays may be particularly appropriate  
9 while a dispositive motion is pending (to accomplish the goals of Rule 1). Nevertheless, the  
10 preliminary peek test, applied as written, leads to most motions to stay discovery being denied.  
11 Accordingly, the preliminary peek test is not well-suited for sorting which cases will be dismissed  
12 (and thus should have discovery stayed) from those cases that will proceed (and thus should *not*  
13 have discovery stayed).

14 *Second*, the preliminary peek test is inefficient. As just explained, if the preliminary peek test  
15 is applied as written (i.e., the Court must be *convinced* after a superficial look at the dispositive  
16 motion that the plaintiff cannot state a claim), it often fails to accurately sort those cases that will  
17 be dismissed (and should have discovery stayed) from those cases that will proceed (and should  
18 not have discovery stayed). To improve the accuracy of the preliminary peek test (and allow  
19 discovery stays in cases in which this Court believes the dispositive motion will be granted), this  
20 Court has in the past engaged in a full analysis of the dispositive motion. This takes considerable  
21 time and delays providing the parties with a decision on the motion to stay discovery.<sup>3</sup> It is also  
22 an inefficient use of judicial resources because both the magistrate judge and the district judge  
23 fully analyze the same dispositive motion. And, even after all this effort, the magistrate judge and  
24 district judge may still have different views on the merits of the dispositive motion. *See also*  
25 Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery*  
26 *When A Motion to Dismiss Is Pending*, 47 Wake Forest L. Rev. 71, 101 (2012) (noting that  
27 having two different judges decide the dispositive motion and the motion to stay discovery

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28 <sup>3</sup> This delay often also creates a *de facto* stay of discovery, which is problematic in and of itself.

1 introduces burden and error into the preliminary peek test). In short, doing a full analysis of the  
2 dispositive motion may improve the accuracy of the preliminary peek test but it takes significant  
3 time, duplicates effort, delays providing the parties a decision on whether discovery is stayed, and  
4 may still lead to discovery being inappropriate stayed or allowed to proceed.

5 This Court believes a better analytical framework exists for determining when motions to stay  
6 should be granted. As the Court previously discussed, the Court may grant motions to stay  
7 discovery when a dispositive motion is pending if (1) the dispositive motion can be decided  
8 without further discovery; and (2) good cause exists to stay discovery. *See Alaska Cargo Transp.*,  
9 5 F.3d at 383 (district court would have abused its discretion in staying discovery if  
10 the discovery was necessary to decide the dispositive motion); *Kamm*, 509 F.2d at 210 (same);  
11 Fed. R. Civ. P. 26(c)(1) (the Court “may, for good cause, issue an order to protect a party or  
12 person from annoyance, embarrassment, oppression, or undue burden or expense,” including  
13 forbidding discovery or specifying when it will occur). “The burden is upon the party seeking the  
14 order to ‘show good cause’ by demonstrating harm or prejudice that will result from the  
15 discovery.” *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004). As the Court will  
16 discuss in more detail below, good cause may be established using the preliminary peek test, but  
17 it may also be established by other factors, not related to the merits of the dispositive motion.

18 The Ninth Circuit has held that good cause to stay discovery may exist when the movant can  
19 convince the Court that plaintiff cannot state a claim. *See Wood*, 644 F.2d at 801 (district court  
20 may stay discovery when it is convinced that plaintiff will be unable to state a claim); *B.R.S. Land*  
21 *Invs.*, 596 F.2d at 356 (same). These cases remain valid authority, and litigants may still move for  
22 a discovery stay under the preliminary peek test. However, as previously discussed, this will only  
23 result in discovery stays in the simplest, legally baseless cases.

24 That said, good cause may exist based on other factors unrelated to the merits of the  
25 dispositive motion. In many cases, the movant seeks a stay of discovery to prevent “undue burden  
26 or expense.” *See* Fed. R. Civ. P. 26(c)(1). Accordingly, the movant must establish what undue  
27 burden or expense will result from discovery proceeding when a dispositive motion is pending.  
28 Movants are encouraged to be specific about the realistically anticipated costs of discovery (based

1 on factors such as the complexity of the claim(s) at issue, the number of claims asserted, the  
2 number of parties involved in the litigation, the number of witnesses including experts, the  
3 volume of documents at issue, etc.). Non-movants opposing a stay of discovery should discuss  
4 their position on these same factors. Additionally, though parties opposing a motion to stay  
5 discovery carry no burden to show harm or prejudice if discovery is stayed, they are encouraged  
6 to discuss any specific reasons why a discovery stay would be harmful (e.g., the case is old and  
7 evidence is getting stale, a witness is sick and may die before discovery begins, the public has an  
8 interest in the speedy resolution of the issues presented, the claimant's resources and ability to  
9 wait for a judgment, etc.). Ultimately, guided by Rule 1 of the Federal Rules of Civil Procedure,  
10 the Court is trying to determine "whether it is more just to speed the parties along in discovery  
11 and other proceedings while a dispositive motion is pending, or whether it is more just to delay or  
12 limit discovery and other proceedings to accomplish the inexpensive determination of the case."  
13 *Tradebay*, 278 F.R.D. at 603.

### 14 **III. Analysis**

15 First, discovery is not needed to resolve the pending Motion to Dismiss. Whether Plaintiff  
16 must allege that he was induced to move to Nevada is a question of law, which does not require  
17 additional discovery.

18 Next, the Court evaluates whether good cause exists to stay discovery. First, the Court  
19 takes note of Judge Mahan's order in *Latcheran v. Primecare Nevada, Inc.*, No. 2:11-CV-1590-  
20 JCM-PAL, 2012 WL 984075 (D. Nev. Mar. 22, 2012), indicating that the complaint in that case  
21 failed as it did not plead facts showing that defendants' false or deceptive representations *induced*  
22 *plaintiff to move to Nevada*. Judge Mahan will be the one ultimately deciding Defendants' Motion  
23 to Dismiss. Given this, the Court is persuaded Defendants stand a great chance of having Claim  
24 No. 2 dismissed. Moreover, Plaintiff has admitted he did not physically relocate to Nevada. ECF  
25 No. 54 at 8. As such, there is additional evidence that Plaintiff will not be able to amend this  
26 claim to bring it within NRS 613.010.

27 Nevertheless, the pending Motion to Dismiss is not dispositive of the entire case. Instead,  
28 even if Defendants prevail on the pending Motion to Dismiss, they must defend against the


1 remaining claims. Thus, it would not be appropriate to stay discovery as to all claims. In addition,  
2 Defendants do not provide any specifics regarding the costs and time that will be incurred by  
3 participating in the discovery process as to this specific claim vis-à-vis the remaining claims. In  
4 this vein, the Court notes the claim at issue overlaps with the claim for breach of contract and  
5 unjust enrichment claims. As a result, the Court does not find good cause to stay discovery.  
6 *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011) (“A showing that discovery  
7 may involve some inconvenience and expense does not suffice to establish good cause...”).

8 **IV. Conclusion**

9 **IT IS THEREFORE ORDERED** that Defendant’s Motion to Stay Discovery (ECF No.  
10 58) is **DENIED**.

11 **IT IS FURTHER ORDERED** that the hearing scheduled for June 21, 2023 is  
12 **VACATED**.

13 DATED: May 22, 2023

14   
15 BREND A WEKSLER  
16 UNITED STATES MAGISTRATE JUDGE  
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